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LETTERS OF INTENT NOT IMPORTANT? BE CAREFUL.

When buying or selling a business, it is critical to take the negotiation and preparation of the letter of intent seriously. All too often, I hear the phrase, "letters of intent are not binding, so we don't need to spend time negotiating them." Other times, a new client will have already signed a letter of intent before engaging our firm or other advisors. Letters of intent contain many key terms, and while it is true that signing a letter of intent will not typically bind a party to close the transaction, it is important for all parties in a transaction to understand that if the transaction does close, it will likely close on the terms contained in the letter of intent. Accordingly, when negotiating a letter of intent in the sale of business context, the parties should invest the time and energy necessary to fully understand the impact the letter of intent's terms will have on the transaction.

A letter of intent (also sometimes referred to as a term sheet or an LOI) is usually prepared by the buyer and presented to the seller, and it describes the key terms of the buyer's proposal to purchase the seller's business. Among other things, the LOI will describe what the buyer is buying (typically, either the assets of the business or the shares in the business), the purchase price, and how the purchase price will be paid (all cash, seller note, earn-out, etc.). It may also contain additional concepts relating to non-competition, post-closing employment for the seller's owner, assumption of liabilities, indemnification, and terms relating to the buyer's lease or purchase of the real estate used by the seller's business. An LOI also typically contains certain provisions that are actually binding on the parties, including provisions that require the seller to deal exclusively with the buyer for a period of time, dictate which state's law will apply when interpreting the LOI, obligate the parties to maintain confidentiality, and state that each party will be responsible for its own transaction expenses. Finally, because buyers and sellers have varying degrees of leverage as a transaction progresses, buyers and sellers may take different approaches when selecting the terms to include and the terms to omit in an LOI.

Given the importance that an LOI will have on the transaction, the parties must understand the terms in the LOI and recognize that the agreed-upon terms in the LOI will form the basis for the terms that will be contained in the definitive purchase agreement and related documents. A party that attempts to change the agreed-upon terms in an LOI, because it did not fully understand the LOI's terms, will face challenges. That party will likely be accused of "re-trading" or "moving the goalposts," and, as a result, the party taking this approach will

often lose a tremendous amount of negotiating capital; capital that could be well spent on other commonly negotiated terms in the definitive purchase documents. This practice often results in a longer transaction process, increased transaction expenses for both parties, and a lower likelihood of the transaction actually closing.

In conclusion, while an LOI is not technically binding on the parties in most cases, the LOI will have a significant impact on the overall transaction. It is critical for the parties to recognize this.

For more information on LOIs and this topic you can contact Jason Scoby at 414-291-4714 and jason.scoby@wilaw.com

Jason Scoby is a member of the firm's Business Practice Group and Banking and Creditors' Rights Practice Group. He advises and represents individuals, businesses, and banks on a variety of corporate, banking, and business-related issues, including mergers and acquisitions, commercial loan transactions, corporate issues, contract negotiation and preparation, and business entity selection and formation.